Scandia Stucco Co. *and* Wood, Wire and Metal Lathers' Local Union 190L, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Plasterers Union Local No. 20, a/w Operative Plasterers and Cement Masons International Association, AFL–CIO *and* Plasterers Union Local No. 65, a/w Operative Plasterers and Cement Masons International Association, AFL–CIO. Cases 18–CA–13033, 18–CA–13084, and 18–CA–13086

November 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On May 22, 1995, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Scandia Stucco Co., White Bear Lake, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with the Wood, Wire and Metal Lathers' Local Union 190L, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Local 190L) as the exclusive representative of all journeyman and apprentice lathers employed by the Respondent during the term of any agreement with Local 190L that is binding on it.

(b) Refusing to cooperate with agents of the Minnesota Wall and Ceiling Contractors Association (MW&CCA) in processing grievances that are filed with that Association in its capacity as the collective-bargaining representative of the Respondent.

(c) Refusing to furnish Local 190L with information necessary and relevant to its collective-bargaining duties by refusing to permit a representative of Local 190L to inspect the Respondent's payroll records in order to determine compliance with the terms of the collective-bargaining agreement between the MW&CCA and Local 190L.

(d) Discharging or constructively discharging employees in order to discourage their membership in a labor organization.

(e) Telling its employees that it intends to, or has become, nonunion at a time when it is lawfully obliged to adhere to the terms of the collective-bargaining agreement between MW&CCA and Local 190L.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by the terms and conditions of the 1992-1995 agreement between the MW&CCA and Local 190L, applicable to all employees employed in the unit specified in paragraph 1(a) above, and any successor agreement to which it is bound.

(b) Promptly cooperate with agents of the MW&CCA in processing the grievance filed by Local 190L on March 8, 1994.

(c) Promptly permit a representative of Local 190L to inspect its payroll records as requested on March 8, 1994, in order to determine the Respondent's compliance with the terms of the collective-bargaining agreement between the MW&CCA and Local 190L.

(d) Offer Rick Sellman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(e) Remove from its files any reference to the unlawful discharge and notify Sellman in writing that it has done so and that it will not use the discharge against him in any way.

(f) Make whole all journeyman and apprentice lathers in its employ at any time since December 1993 for any loss of pay and benefits resulting from its repudiation of the agreement between MW&CCA and Local 190L, in the manner set forth in the remedy section of the decision.[3]

[1] Member Browning finds it unnecessary to pass on the judge's discussion concerning the requirements for establishing the existence of a ''full'' 9(a) collective-bargaining relationship in the construction industry. Member Browning notes that the judge found, and all parties concede, that Charging Party Lathers' Local 190L was a ''limited'' 9(a) representative as sanctioned by Sec. 8(f) of the Act.

[2] We shall modify the judge's remedy and recommended Order to provide standard remedial language for the violations found.

[3] In addition to the make-whole requirements set forth in the remedy section of the judge's decision, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make contractually required payments to fringe benefit trust funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the em-

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its White Bear Lake, Minnesota facility and its job sites copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints in Cases 18–CA–13084 and 18–CA–13086 are dismissed.

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ployee, but the amount of such reimbursements will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain collectively in good faith with the Wood, Wire and Metal Lathers' Local Union 190L, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Local 190L) as the exclusive representative of all journeyman and apprentice lathers employed by us during the term of any agreement with Local 190L which is binding upon us.

WE WILL NOT refuse to cooperate with agents of the Minnesota Wall and Ceiling Contractors Association (MW&CCA) in processing grievances that are filed with that association in its capacity as our collective-bargaining representative.

WE WILL NOT refuse to furnish Local 190L with information necessary and relevant to its collective-bargaining duties by refusing to permit a representative of Local 190L to inspect our payroll records in order to determine compliance with the terms of the collective-bargaining agreement between the MW&CCA and Local 190L.

WE WILL NOT discharge or constructively discharge employees in order to discourage their membership in a labor organization.

WE WILL NOT tell our employees that we intend to, or have become, nonunion at a time when we are lawfully obliged to adhere to the terms of the collective-bargaining agreement between MW&CCA and Local 190L.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL abide by the terms and conditions of the 1992–1995 agreement between the MW&CCA and Local 190L, and any successor agreement to which we are bound, applicable to our journeyman and apprentice lathers.

WE WILL promptly cooperate with agents of the MW&CCA in processing the grievance filed by Local 190L on March 8, 1994.

WE WILL promptly permit a representative of Local 190L to inspect our payroll records as requested on March 8, 1994, in order to determine our compliance with the terms of the collective-bargaining agreement between the MW&CCA and Local 190L.

WE WILL offer Rick Sellman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discharge and notify Rick Sellman in writing that we have done so and that we will not use the discharge against him in any way.

WE WILL make whole all journeyman and apprentice lathers in our employ at any time since December 1993 for any loss of pay and benefits resulting from our repudiation of the agreement between MW&CCA and Local 190L, including losses to the trust funds established on their behalf, with interest.

SCANDIA STUCCO CO.

James L. Fox, Esq., for the General Counsel.
Gregg J. Cavanagh, Esq. (Leonard, Street & Deinard), of Minneapolis, Minnesota, for the Respondent.
Roger A. Jensen, Esq. (Peterson, Bell, Converse & Jensen), of Minneapolis, Minnesota, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The General Counsel of the National Labor Relations Board claims that Scandia Stucco Co. (Respondent or Company), allegedly bound to three collective-bargaining agreements through a multiemployer association, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by repudiating those agreements in midterm, failing to furnish information requested by one of the recognized employee representatives, refusing to process a grievance filed under one of the agreements, constructively discharging an employee who declined to work under terms other than those provided in the agreement, and threatening employees that it would be nonunion when they returned from a winter layoff.

The Wood, Wire and Metal Lathers' Local Union 190L, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Local 190L) filed the charge in Case 18–CA–13033 on March 8, 1994.[1] Thereafter, Plasterers Union Local No. 20 (Local 20) and Plasterers Union Local No. 65 (Local 65), both affiliated with Operative Plasterers and Cement Masons International Association, AFL–CIO, filed the charges in Cases 18–CA–13084 and 18–CA–13086 on April 20 and 21, respectively. All three cases were consolidated and came before me pursuant to the consolidated and amended complaint and notice of hearing issued on May 17, by the Regional Director for Region 18, acting on behalf of the General Counsel. Respondent timely answered the complaint by denying that it engaged in the unfair labor practices alleged.

I heard this consolidated matter on June 23, 1994, at Minneapolis, Minnesota. After careful consideration of the record, the witnesses' demeanor while testifying, the briefs of the General Counsel and Respondent, and the General Counsel's motion to dismiss, I find Respondent violated the Act, as alleged, as to Local 190L but did not violate the Act as to Locals 20 and 65 on the basis of the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Minnesota corporation with an office and place of business in White Bear Lake, Minnesota, has been engaged as a lathing and plastering contractor in the construction industry doing residential and commercial work. Respondent, in the course and conduct of its business, provided services valued in excess of $50,000 for enterprises within the State of Minnesota, each of which annually purchase and receive at their facilities located within the State of Minnesota goods valued in excess of $50,000 directly from suppliers located outside the State of Minnesota. Respondent stipulated, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find based on the record that at all material times Local 190L is a labor organization within the meaning of Section 2(5) of the Act.

[1] If not shown otherwise, all dates refer to the 1994 calendar year.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Relevant Evidence*

Although a corporation, Scandia is essentially a family business. It was founded by Leonard Wojtowicz Sr. and his sons, Nicholas (Nick) Wojtowicz and Leonard Wojtowicz Jr. (Leonard Jr.) in 1975. Leonard Sr. retired in 1992. Since that time the business has been operated by Nick, Leonard Jr., and their sibling, Guy. At the time of the hearing Nick served as the Company's chief executive officer, Leonard Jr. served as its chief financial officer, and Guy as the corporate secretary. Guy works primarily as a lather and job foreman.

Respondent, if currently bound to any collective-bargaining agreements at all, is bound to those agreements negotiated by the Minnesota Wall and Ceiling Contractors Association (MW&CCA). MW&CCA is a nonprofit organization comprised of 11 contractor members (including Respondent) and a number of associate members who are primarily industry suppliers. MW&CCA engages in collective-bargaining and contract-administration activities on behalf of its contractor members with five different labor organizations, three of which are involved here. In addition, MW&CCA performs a number of industry-promotion activities, and lobbies government entities for its members and the industry in general. Its activities are funded by annual membership dues as well as monthly allocations from the promotion funds established by its collective-bargaining agreements.

MW&CCA executes agreements on behalf of its members. Contractors who are not MW&CCA members must execute the agreements in their own name if they chose to adopt that association's contracts. William Grimm, the MW&CCA executive director, asserted that it is not possible to belong to the MW&CCA as a contractor member without being represented by it for collective-bargaining purposes and that all of its contractor members are bound by its labor agreements. Grimm conceded, however, that MW&CCA has no written authorization from Scandia specifically designating that association as its collective-bargaining representative even though MW&CCA solicits such authorizations from its contractors from time to time. Scandia officials acknowledged receipt of those authorization forms over the years but assert that they never executed those forms. If MW&CCA activities are controlled by any organic documents, i.e., any incorporation articles or bylaws, those documents are not in evidence.

Everyone agrees that Leonard Sr. executed the 1978–1981 MW&CCA-Local 190L agreement on July 17, 1978, and that Scandia was separately bound to that agreement until it expired on May 1, 1981. No Scandia official executed any other labor agreement with any union thereafter. In 1979 Scandia became a MW&CCA contractor member after receiving at least two solicitations detailing MW&CCA's functions. Both documents reflect that one of MW&CCA's primary services includes employer representation in collective bargaining. Thus, one of those documents reads in pertinent part:

> The MW&CCA provides a number of important services to its members and to the industry as a whole.
>
> The MW&CCA is the employers collective bargaining representative with three unions, the Minneapolis Lathers, Plasterers and Plaster Tenders. It is this Association that strives to conduct reasonable contract nego-

> tiations with these unions in order to keep lath and plaster a competitively priced system in this area and to provide long-term employment for our craftsmen.
>
> . . . .
>
> The MW&CCA provides management trustees for jointly administered health and welfare and pension trust funds and representatives to apprenticeship committees, grievance committees and the Promotion Bureaus. These are important functions and provide all contractors with a valuable service, whether MW&CCA members or not. Responsible contractor representation on these committees is essential for stable labor management relations and on-going industry promotion throughout the year.

Both Nick and Leonard Jr. asserted, however, that Scandia became a MW&CCA member solely to qualify for the executive health insurance plan it sponsors. Nevertheless, in February 1981 when Local 190L notified MW&CCA that it wanted to negotiate a new agreement, it requested ''an updated list of the parties that you represent.'' A week later, MW&CCA responded by letter enclosing its membership list that included Scandia. That same MW&CCA letter also promised that ''[w]e will forward from time to time lists of *other contractors who will authorize MW&CCA to represent them* in negotiations. [Emphasis added.]'' Leonard Sr., presumably Scandia's chief executive officer throughout this period, did not testify nor was his absence otherwise explained apart from the fact that he is now retired.[2]

Insofar as this record shows, until the circumstances giving rise to these cases Scandia paid its lathers in accord with the wage and fringe benefit terms of all successor MW&CCA-Local 190L agreements following the expiration of the 1978–1981 agreement that it executed. In addition, what little evidence there is shows that Respondent also paid its plasterers in accord with the economic terms of the agreements Locals 20 and 65 negotiated with MW&CCA, or the predecessor association in St. Paul that negotiated with Local 20. Grimm testified that prior to March 1994 no Scandia official ever claimed to him or, to his knowledge, any other MW&CCA representative, that Scandia was not bound by the MW&CCA labor agreements.

Both Nick and Leonard Jr. generally conceded that they knew MW&CCA functioned as a multiemployer bargaining representative and that MW&CCA regularly mailed notices to Scandia concerning its collective-bargaining activities. During and following the 1992 contract negotiations, these mailings included general information concerning the status of the ongoing negotiations, ''payroll alerts'' reflecting the amounts and effective dates of the newly negotiated wage and benefit rates, and followups providing the members with copies of the complete agreement.

Rick Sellman, a Scandia lather from the fall of 1991 until approximately February 1994, testified that he once overheard Leonard Sr. speak with a potential customer. During the conversation, Leonard Sr. compared Scandia to a nonunion competitor and told the customer that Scandia hired ''union men whereas this other company didn't.'' Leonard Jr. acknowledged that Scandia generally held itself out, particularly in connection with soliciting commercial work from general contractors, as a ''union contractor.''

Plasterers Local 20 permits members who enter business as contractors to maintain their membership by paying a ''contractor's fee'' rather than the regular membership dues. Leonard Sr. maintained such a membership status during his working years. When he retired, Randy Lindorff, then employed by Scandia as a plasterer, purportedly became a ''partner'' in the business to satisfy the licensing requirement that the Company employ a licensed master plasterer. At that time Leonard Jr. notified Local 20 that Scandia would be paying Lindorff's ''contractor fees.'' Additionally, in the mid-1980s, a Local 190L business agent discovered Guy working on a project with the tools of the trade and insisted that he become a Local 190L member. Guy testified that he finally joined that Union about a year and a half later when his brothers selected him to run ''an all-union project'' associated with the University of Minnesota. He continued his membership until 1994.

Scandia officials also acknowledged that the Unions involved here referred employees for employment with the Company from time to time. Additionally, in 1989, Nick requested that Local 190L provide the Company with a letter concerning the availability, through that Union, of minority workers for employment on a project governed by certain affirmative action regulations.

Over the years, none of the Scandia officials who testified attended any MW&CCA meetings for the purpose of formulating bargaining strategy or attended bargaining sessions involving the MW&CCA and these three unions. Scandia officials acknowledged that they attended some of the MW&CCA social functions over the years but conceded that they never made any attempt to disclose their limited membership intentions to the other contractors also in attendance at these functions.

At the time of the hearing, the MW&CCA agreement with Local 190L was effective from May 1, 1992, through April 30, 1995. The term of the current agreements between MW&CCA and both Local 20 and Local 65 is from June 1, 1992, through May 31, 1995. The Local 20 and Local 65 agreements are geographically specific.[3] The recognition article in the Local 190L agreement provides that MW&CCA ''is hereby recognized as the exclusive bargaining representative to all members of the MW&CCA bound by this working agreement and said association is further recognized as the exclusive body to select employer representatives to serve on any board or trust created under the working agreement.'' The following provision (quoted from the Local 20 agreement) is substantively identical in the current Local 20 and Local 65 agreements.

[2] Daniel Peltier, a Local 20 business representative, testified that he telephoned Scandia after receiving notice that it requested to be dropped from the fringe benefit rolls in November or December 1993. On this occasion, he spoke with Leonard Sr. and asked if Scandia was going nonunion. Leonard Sr. told Peltier that he would have to speak with Leonard Jr. about that matter but the elder Wojtowicz did indicate that the Company was having difficulty competing in the residential market.

[3] The Local 20 agreement applies in the following Minnesota counties: Ramsey, Dakota, Washington, Chisago, and parts of Anoka and Pine Counties. The Local 65 agreement applies in these counties: Wright, Hennipen, Carver, Scott, Sibley, McLeod, Mille Lacs, Kanabec, and parts of Anoka, Sherburne, and Isanti Counties.

Article I

Designation of Parties

> Agreement executed in triplicate and effective this 1st day of May, 1992 by and between [MW&CCA] as Attorney-in-Fact for and on behalf of all duly licensed or Active Master Plasterers & Lathers . . . jointly and severally, who have or may hereafter authorize the said Association, in writing, to negotiate and execute this Agreement, party of the first part, hereinafter called the Employers, and [Local 20] for and on behalf of its members, jointly and severally, and all those persons who hereafter may become members of said Union, party of the second part, hereinafter called the Employees.

For the past few years, Scandia submitted fringe benefit contributions on behalf of its employees to Wilson-McShane Corporation, a fringe benefit trust fund administrator for Local 190L and Local 65 agreements. Scandia's fringe benefit trust payments under the Local 20 agreement were made to Zenith Administrators that administered the trust plans established under the Local 20 agreement.

William Fitzgerald, an auditor with Wilson-McShane, testified that an employer must be signed to a collective-bargaining agreement in order to make contributions to the fringe benefit funds it administers. Fitzgerald further asserted that if his Company cannot establish that an employer who submits contributions is a signatory to an agreement, ''we couldn't accept it [the contribution] under law and we'd refund the money.'' Reports are in evidence reflecting Scandia's contributions to Wilson-McShane from 1991 until November 1993.[4] Guy acknowledged that the health plan under the Local 190L trust paid a $40,000 medical benefit for one of his family members.

In early June 1993, Local 190L Business Agent John Orr requested Wilson-McShane to audit Scandia. Pursuant to this request Fitzgerald contacted Leonard Jr. for the purpose of inspecting Scandia's books and records. During the course of their meeting (which actually occurred in the fall of 1994), Leonard Jr. told Fitzgerald that the ''Union was for shit'' and that ''as of November 1993 [Scandia was] going non-union'' because the wages and fringe benefits were too high for it to compete. During Fitzgerald's audit Leonard Jr. allowed an inspection of the 1991 and 1992 records but refused to provide 1993 records because, as Leonard Jr. put it, ''I felt we had no agreement with them anyways, it wasn't required to give them any information.'' Scandia's December 1993 fringe fund report to Wilson-McShane reflects that it was a ''final report.'' Since that time it has made no contributions to the fringe benefit funds.

Sellman testified that near the end of the season in late 1993 several conversations occurred involving the three Wojtowicz brothers, lather Tom Bahr, and himself about ''going non-union'' when work resumed the following spring. According to Sellman, ''pretty much all of them'' stated that ''they might be going non-union in the spring'' and stated that Sellman would be nonunion as well.[5] Guy testified that he and his two brothers met separately with at least three employees (Sellman, Bahr, and plasterer Dean Thompson) at the end of the 1993 season to explain the terms of a ''package deal,'' which would be available at the start of the 1994 construction season. This offer included a salary comparable to the union wage rate and different fringe benefits including new health insurance and pension plans.

From time to time during the winter layoff Sellman stopped at Scandia's warehouse for information about the resumption of work. At the time work was ready to resume (apparently sometime in February or early March), the Wojtowiczs explained to Sellman and Bahr that they would be paid ''non-union'' wages and fringe benefits. The morning following this conversation Sellman went to the warehouse and told the Wojtowiczs and Bahr that ''I changed my mind and decided to stay with the Union.'' Thereafter, he collected his personal tools and left. Guy recalled that Sellman first acted ''just like he normally does'' that morning but after a short while he seemed to break down. When Guy asked what was wrong, Sellman stated, ''Well, I'm sorry guys, but I can't stay with you guys.'' Guy claims that Sellman mentioned some family problems but ''he didn't really get into much more detail than that.''

At the beginning of the 1994 construction season, Thompson resigned from Local 65. By letter dated February 24, 1994, Bahr resigned his membership in Local 190L. The following day Orr wrote to Bahr requesting that he appear before the Local 190L executive board ''as there are some conditions and circumstances that you may not be aware of.'' Timothy Schupp, an attorney who admittedly represents Scandia concerning its business affairs, responded to Orr on March 1 advising that he had been retained by Bahr ''in connection with his resignation'' from Local 190L and that Bahr ''respectfully declines your invitation'' to attend the union's executive board meeting.[6]

During his examination by the Charging Parties' counsel, Sellman claimed that he had been told by some unspecified individual that he ''wouldn't be able to [continue to work with Scandia] if [he] continued with the Union.'' On cross-examination, however, Sellman admitted that no one from Scandia ever told him that he would have to resign from the Union in order to work there but he asserted that he did not know that he could continue his Local 190L membership and still work at Scandia. The Wojtowiczs denied telling their employees that they would be required to resign their union memberships in order to work for Scandia.

On March 8, Orr sent a letter to Respondent asking for access to Scandia's payroll records for inspection by a Local 190L representative in order to ascertain compliance with the MW&CCA-Local 190L agreement. Scandia officials did not respond to this request. Orr also filed a grievance with

[4] These documents reflect that Scandia did not submit contributions for the ''promotion'' fund that is used in part to support the activities of MW&CCA. Leonard Jr. testified that he once telephoned Wilson-McShane's office to advise that he was not going to pay the promotion fund contribution but the record does not indicate the reason Scandia never made such payments.

[5] Respondent does not specifically deny that the discussions about going nonunion took place. Rather, Respondent, in its brief, contends that the phrase ''going non-union'' referred to the company's transition from a ''union'' to a ''non-union'' compensation scheme.

[6] Leonard Jr. initially denied talking to Bahr about his resignation from Local 190L. He subsequently admitted, however, recommending Respondent's law firm to represent Bahr and admitted that he was present with Bahr at the attorney's office. Bahr did not testify.

MW&CCA on March 8 charging Scandia with violations of several contract articles, including the wage and fringe benefit provisions.

Grimm telephoned Nick concerning the grievance. During their conversation, Nick took the position that Scandia was not bound by the MW&CCA-Local 190L agreement. Grimm attempted to convince Nick ''that withdrawing from a labor agreement was technical in nature, and certain steps had to be followed'' but terminated their conversation and action on this grievance after Nick told Grimm that Scandia was already represented by an attorney.

B. *Further Findings and Conclusions*

1. The 8(a)(5) allegations

Section 8(a)(5) provides that it is an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).'' Section 8(d) defines the obligation to bargain collectively to require that no party to a contract ''shall terminate or modify such contract, unless the party desiring such termination or modification . . . continues in full force and effect . . . all the terms and conditions of the existing contract for a period of 60 days [following a notice the Federal Mediation and Conciliation Service] or until the expiration date of such contract, which ever occurs later.''

Section 9(a) provides that ''[r]epresentatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit.'' Ordinarily, it is an unfair labor practice for an employer and a labor organization to enter into a collective-bargaining agreement in which the union is recognized as the exclusive collective-bargaining representative when its majority standing among the unit employees has not been established. *Garment Workers Union v. NLRB*, 366 U.S. 731 (1961). Section 8(f), however, insulates employers primarily engaged in the building and construction industry and labor organizations from an unfair labor practice finding when they ''make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9.''

In the construction industry, collective-bargaining agreements are presumed to be prehire agreements sanctioned by Section 8(f) unless the party asserting the existence of a full 9(a) relationship affirmatively proves such a relationship was established either through a Board-conducted representation election, or the recognition of the union by the employer based on a ''contemporaneous showing of union support among a majority of the employees in an appropriate unit,'' i.e., usually authorization cards or petitions signed by employees specifically authorizing the recognized union to represent them. *J & R Tile*, 291 NLRB 1034 (1988).

If an employer enters into an 8(f) agreement with a labor organization, or otherwise becomes bound to such an agreement, it is ordinarily precluded by Section 8(a)(5) from repudiating that agreement during its term. *John Deklewa & Sons*, 282 NLRB 1385 (1987). As Deklewa bestows a ''limited 9(a)'' status on the 8(f) employee representative in order to trigger the 8(a)(5) enforcement mechanism, that status requires the representative to function as the exclusive representative of all employees in an appropriate unit. Accordingly, agreements limited to ''members only'' fail to meet that fundamental statutory predicate and, hence, they are unenforceable under Section 8(a)(5). *Don Mendenhall, Inc*., 194 NLRB 1109 (1972).

When an employer expressly vests a joint bargaining representative with authority to bind it in future negotiations or, by its course of conduct, unequivocally manifests a desire to be bound in future collective bargaining by group rather than individual action, the Board deems the employer to be a member of the multiemployer group. *Taylor Motors*, 241 NLRB 711 (1979); *Greenhoot, Inc*., 205 NLRB 250 (1973). Employer intent to be bound by group action need not be manifested by a written authorization. See *Kroger Co*., 148 NLRB 569, 571 (1964) (Board held employer bound to multiemployer agreement based on 15-year bargaining history even though no formalized multiemployer association existed); *Caamano Bros.*, 304 NLRB 24, 25 (1991) (employer bound by multiemployer agreement when all other association members were represented for collective-bargaining purposes and employer failed to indicate that it did not want to be so represented).

The General Counsel contends that Scandia is bound to the latest agreement between MW&CCA and Local 190L by virtue of its long-term membership in that association, its awareness that MW&CCA acted as the collective-bargaining representative for its members, and its historical compliance with the MW&CCA labor agreements. Accordingly, General Counsel argues that Respondent violated Section 8(a)(5) by repudiating the Local 190L agreement, by failing to provide that union with the information requested on March 8, and by refusing to process the March 8 grievance. The General Counsel, however, now moves to dismiss the complaint allegations charging that Respondent unlawfully repudiated the Local 20 and Local 65 agreements citing the Board's decision in *Stack Electric*, 290 NLRB 575 (1988), and the trust administrators' records reflecting that Respondent did not have any employees in the Local 20 unit and only one employee in the Local 65 unit.

Respondent argues that it is not bound by the MW&CCA agreements with any of the Charging Parties because it has never authorized the MW&CCA to bargain on its behalf and it has never separately executed agreements with the Charging Parties other than the long-expired agreement with Local 190L. As for its MW&CCA membership, Respondent contends that it joined that group merely to obtain its group health benefit plan for its officers and that it contributed to the Charging Parties' fringe benefit trusts not because it was contractually bound to do so but because a number of its employees were union members who desired the Unions' benefits that were reasonable and met their employees' needs. Because it was not bound to any agreement with the Charging Parties, Respondent asserts that as it had no obligation to furnish the requested information or process grievances. Respondent makes no contention based on the *Stack Electric* theory.

No party attempted to establish that Scandia had a ''full'' 9(a) relationship with any of the Unions involved here; on the contrary, the General Counsel's complaint concedes that a ''limited 9(a)'' relationship existed in all three instances at issue here. Likewise, no claim is made that Scandia ever en-

tered into separate agreements in its own name with any of the three involved unions following the 1978–1981 agreement with Local 190L.

Based on the principles detailed above, however, I find that the General Counsel established that Respondent is bound to the current MW&CCA-Local 190L agreement based on its MW&CCA membership and prior conduct but failed to establish that Respondent is bound to the current Local 20 and Local 65 agreements with MW&CCA. Moreover, even if it is assumed that Respondent is bound by the Local 20 and Local 65 agreements, I find those agreements are not enforceable under Section 8(a)(5) as they are, by their terms, member-only agreements.

As for the Local 190L agreement, I find Respondent manifested the requisite intent to be bound by group action for collective-bargaining purposes through its membership in the MW&CCA and its conduct from 1979 until November 1993. This finding is predicated on the following significant factors: First, Respondent entered into a separate agreement with Local 190L in 1978 and, although it entered into no further separate agreements, it maintained the appearance of an unbroken bargaining relationship with that union by joining the MW&CCA, continuing to employ Local 190L members, and paying them in accord with that union's agreements with the MW&CCA for 12 years after its separate agreement expired. Second, Respondent joined the MW&CCA as a contractor member prior to the expiration of its separate agreement with Local 190L with knowledge that collective-bargaining representation was a principal service offered by that association. Third, despite its present, self-serving contention that it joined the MW&CCA merely for its executive health plan, no evidence was adduced that it ever put the MW&CCA on notice that its membership was limited in any fashion. Fourth, the essence of Grimm's testimony strongly suggests that the MW&CCA would not have accepted Respondent as a contractor member without authority to bargain on behalf of Respondent and the fact that the MW&CCA maintains a separate membership category for suppliers that it does not represent for collective-bargaining purposes lends credence to his assertion on this point. Fifth, Respondent's officials attended MW&CCA social functions over the years and admittedly remained silent on these occasions with respect to its purportedly limited membership intentions around other members who very obviously had a important stake in uniform labor costs. Sixth, Respondent's officials held themselves out as a ''union'' contractor to customers and, more importantly, to general contractors from whom it sought work. Seventh, Respondent adhered to the wage, benefit, and union-security provisions of the MW&CCA agreements, and utilized those unions as a source for skilled labor that it knew, or should have known, would lead both its employees and their representatives to believe that Respondent regarded itself as bound by the MW&CCA-negotiated agreements. And eighth, the Respondent's ''non-union'' statements commencing in November 1993 strongly suggests that its officials recognized that they had previously adhered to the ''union'' terms, which in this case could only have been established through group bargaining. Considered together, these factors clearly demonstrate Respondent's intent beginning in 1979 to be bound in collective bargaining by group rather than individual action.

Respondent contends, however, that an employer's objective intent to be bound by group action ''*must be manifest by express delegation to the association's bargaining arm or by participation in the group bargaining process.*'' Respondent cites several cases in which the Board and the courts have relied on those indicia in reaching a conclusion that an employer was or was not bound by group action. In particular, Respondent emphasizes *Shearson Environmental Design Co. v. Laborers' District Council*, 144 LRRM 2770 (E.D. Pa. 1993).

This argument by Respondent fundamentally fashions a new and unsupported legal standard for cases of this nature from ultimate factual conclusions in selected cases. The fallacy of this approach is evident from *Caamano Bros*., supra, in which the Board found the employer bound by group action in the absence of any ''express'' delegation or participation in group bargaining. Moreover, Shearson is plainly distinguishable on its facts. Thus, even though that employer was a member of an association, which engaged in collective-bargaining activities on behalf of its members, there was no evidence that it had ever employed represented employees, paid its employees or otherwise applied the terms of the association agreement, received notices of any kind concerning the association's bargaining activities, or held itself out as a ''union'' contractor.

Although it is true that Respondent apparently never executed a written authorization for MW&CCA to bargain on its behalf, I do not find that controlling at least as to Local 190L. Thus, Section 2(13) specifically provides that neither actual authorization nor subsequent ratification controls the determination as to whether ''any person is acting as an 'agent' of another person.'' In my judgment, the eight factors I have enumerated above reasonably imply Respondent authorized MW&CCA to act as it collective-bargaining representative. Restatement 2d Agency 26, (1958). At the very least, those factors strongly support a finding that the MW&CCA had the apparent authority to bind Respondent. Restatement 2d Agency 27 (1958). To hold otherwise would effectively countenance the hoodwinking of numerous parties with substantial interests at stake including MW&CCA officials and other contractor members of that association, the employees and unions involved, the trust funds, Respondent's customers, and the general contractors with whom Respondent does business.

Having concluded that Respondent was bound by the MW&CCA-Local 190L agreement, I find Respondent violated Section 8(a)(1) and (5) by repudiating that agreement effective at the start of the 1994 construction season, including its failure or refusal to pay the wages and benefits specified therein, and its failure to cooperate with Grimm in the processing of the March 8 grievance filed by Local 190L under the contractual grievance procedure. *John Deklewa & Sons*, supra. In reaching this conclusion, I reject Respondent's contention that it merely breached the agreement and did not unlawfully repudiate it. The evidence plainly shows that Respondent devised a whole new employee compensation scheme to supplant the wage and benefit provisions of the negotiated agreement. Such action is tantamount to unlawful repudiation. *Oak Cliff-Golman Baking Co*., 207 NLRB 1063 (1973). I further find that the information requested by Orr's March 8 letter is presumptively relevant to Local 190L's performance of its duties as the collective-bargaining

representative and that Respondent's failure to make that information available for inspection as requested also violated Section 8(a)(1) and (5). *Woodworkers v. NLRB*, 263 F.2d 483 (D.C. Cir. 1959).

Notwithstanding my conclusion that Respondent unequivocally manifested a desire to be bound group rather than individual action, the MW&CCA agreements with Local 20 and Local 65—unlike its agreement with Local 190L—specifically requires that employers must authorize MW&CCA in writing to negotiate and execute those agreements on their behalf. In my judgment, this specific language supplants the ordinary standard and the Board is not at liberty to ignore it. *H. K. Porter v. NLRB*, 397 U.S. 99 (1970) As there is no evidence that Respondent provided the requisite authorization to MW&CCA, I have concluded that the General Counsel has failed to prove that Respondent is bound by those agreements.[7] See *Adobe Walls*, 305 NLRB 25 (1991). Moreover, as both the Local 20 and Local 65 agreements define employees as ''members'' of those respective labor organizations, I find these member-only agreements are not enforceable under Section 8(a)(5) in any event. *Don Mendenhall, Inc*., supra. Accordingly, I will recommend dismissal of the Local 20 and Local 65 cases in their entirety.[8]

2. The independent 8(a)(1) and (3) allegations

Section 8(a)(1) provides that it is an unfair labor practice for an employer to ''interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' Section 7 guarantees employees the right to ''self-organization, to form, join or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.'' Section 8(a)(3) provides that it is an unfair labor practice for an employer to discriminate against employees ''to encourage or discourage membership in any labor organization.''

Section 8(a)(1) prohibits employer statements that interfere with guaranteed employee rights. The test for determining whether employer conduct violates Section 8(a)(1) does not depend on the intent of the speaker, but instead on whether the statement ''has the tendency to interfere with, restrain, or coerce the employees in the exercise of Section 7 rights.'' *Cox Fire Protection*, 308 NLRB 793 (1992).

An employer may also violate Section 8(a)(3) under a theory of constructive discharge by presenting its employees with the ''Hobson's choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act.'' *White-Evans Service Co.*, 285 NLRB 81 (1987).

The General Counsel asserts that Respondent unlawfully threatened employees by telling them that it was going ''non-union'' and that they would be nonunion also. Finally, the General Counsel contends that Respondent constructively discharged Sellman. Respondent argues that it engaged in no coercive conduct. Instead, it claims that Sellman voluntarily quit his employment and that it did not coerce employees to resign their membership in order to continue their employment in 1994.

I find that statements by Respondent's officials to Sellman that Scandia was going nonunion and that he would also be nonunion had a reasonable tendency to interfere with and restrain Sellman's exercise of his rights under the Act especially in light of the context in which they were made. Sellman was a 15-year member of Local 190L. So long as Scandia honored the contract to which it was bound with Local 190L, Sellman could expect to continue his employment and enjoy the benefits of representation by that Union. By announcing its intention of going ''non-union,'' Respondent necessarily put Sellman in the position of abandoning either his job, his union membership, or any expectation of representation his membership and work under a union agreement might imply. The conclusion that such talk was so construed is supported by the fact that two similarly situated employees—Bahr and Thompson—both resigned their union memberships in their respective local unions and continued to work for Scandia. Hence, I find that Respondent violated Section 8(a)(1) of the Act by its ''non-union'' statements to its employees.

In its brief, Respondent concedes that Sellman quit his employment with Respondent because it decided to ''adopt its own compensation package.'' As previously found, Respondent is mistaken in its view that these changes were lawful. Therefore, it begs the question to argue that Sellman quit his employment as he had no other choice if he desired to work under the union agreement. Accordingly, I find that Sellman was constructively discharged by the Respondent in violation of Section 8(a)(1) and (3). *White-Evans Service Co*., supra. Contrary to the assumption in Respondent's argument, it is of no moment whether or not any of Respondent's officials insisted that Sellman resign his membership in order to continue his employment in 1994.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 20, Local 65, and Local 190L are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent is bound to the collective-bargaining agreement that MW&CCA entered into with the MW&CCA and Local 190L.

4. Respondent is not bound to the collective-bargaining agreements entered into between Locals 20 and 65.

5. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act in or about November 1993 and February 1994 by telling its employees that it was going nonunion, and that they would be nonunion as well.

[7] I note that this contractual written authorization requirement appears to explain the purpose of the authorization forms that the MW&CCA sent to members from time to time.

[8] In view of these conclusions, I find it unnecessary to rely on the *Stack Electric* theory proposed by the General Counsel. Indeed, I am not satisfied that the evidence is sufficiently reliable to apply *Stack Electric*. Although Respondent's trust fund reports, relied on by the General Counsel for this motion, reflect no employees in the Local 20 unit for a considerable period and only one employee in the Local 65 unit for an equal period, Fitzgerald's uncompleted audit detracts considerably from the reliability of those reports especially when, as here, Leonard Jr.'s testimony reflects that the Company employed 22 employees at the time of the hearing. Even assuming those 22 employees include the three owners and two part-time clerical employees as implied, the unit placement of the other 17 employees remains unknown.

6. Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act by constructively discharging Rick Sellman in February 1994.

7. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by repudiating the collective-bargaining agreement between the MW&CCA and Local 190L during its term, refusing to furnish Local 190L with information necessary and relevant to the discharge of its collective-bargaining duties, and refusing to cooperate with MW&CCA agents in processing the grievance filed by Local 190L.

8. Respondent did not engage in an unfair labor practice by repudiating the agreements between MW&CCA and Locals 20 and 65.

9. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, Respondent will be ordered to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

Respondent must promptly make available the information requested by Orr in his March 8 letter. Respondent must also abide by the terms of the MW&CCA agreement, and any successor thereto during the term of that agreement and any successor thereto binding on it. In addition, Respondent must make all unit employees and trust funds established under the Local 190L agreement whole for losses incurred as a result of its repudiation of that agreement. Backpay for employees employed by Respondent following its repudiation of the Local 190L agreement shall be computed in accord with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions to all benefit trust funds is to be computed in accord with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

Respondent must immediately offer in writing to reinstate Sellman to his former position or, if that position no longer exists, to a substantially equivalent position and make Sellman whole for the losses he incurred by reason of the discrimination against him. Sellman's backpay and benefits shall be computed on a quarterly basis as provided in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as provided in *New Horizons for the Retarded*, supra. Trust fund contributions due on Sellman's behalf shall be computed in accord with *Merryweather Optical Co., supra.*

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

[Recommended omitted from publication.]